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GARNISHMENT OF NON-RESIDENT'S CHOSE IN ACTION. SCHROEDER WINE & LIQUOR CO. v. WILLIS COAL & MINING CO.[1]—The jurisdiction for garnishment is based on the possession by the garnishee of property of the principal debtor which is within the jurisdiction of the court and therefore subject to its control.[2] In the case of corporeal chattels, the jurisdiction depends upon the actual situs of the property within the control of the court. The garnishment proceeding must be brought in the state in which the garnishee holds possession of such chattels. In the case of a chose in action evidenced by a document of value in itself, the jurisdiction in which the document is found has control over the document, as an ordinary corporeal chattel, and to that extent has control over the chose in action. The document in such a case has an actual situs within the jurisdiction.[3] A judgment may be said to have a situs in the court rendering it, the sovereign of the place having complete and sole power over it.[4]

1. (1913) 179 Mo. App. 93, 161 S. W. 352.
2. Beale, The Exercise of Jurisdiction in Rem to Compel Payment of a Debt, 27 Harvard Law Review 112; *The Western Railroad* v. *Thornton* (1878) 60 Ga., 300; *Sutherland* v. *Second National Bank* (1880) 78 Ky. 250; *Montrose Pickel Co.* v. *Dodson & Hills Mfg. Co.* (1888) 76 Ia. 172, 40 N. W. 172; *Bates* v. *Chicago M. & St. P. Ry. Co.* (1884) 60 Wis. 296; 19 N. W. 72; *Douglass* v. *Phoenix Insurance Co. of Brooklyn, N. Y.* (1893) 138 N. Y. 209, 33 N. E. 938; *Lawrence* v. *Smith* (1864) 45 N. H. 533; *L. & N. R. R. Co.* v. *Dooley* (1885) 78 Ala. 524.
3. *Stern* v. *Queen* (1896) 1 Q. B. 211; *Amsden* v. *Danielson* (1895) 18 R. I. 787, 31 Atl. 4.
4. 27 Harvard Law Review 113; *Tourville* v. *Wabash R. R. Co.* (1899) 148 Mo. 614, 50 S. W. 300; *Wabash R. R. Co.* v. *Tourville* (1900) 179 U. S. 322, 45 L. Ed. 210, 21 Sup. Ct. Rep. 113; 14 Am. & Eng. Encyc. 777.

If the chose in action is not evidenced by a document, the cases are in confusion as to the proper procedure. The question is usually discussed as a matter of determining the situs of the chose in action. One learned writer outlines six different views followed in the courts of various jurisdictions in the United States.[5] The situs has been held to be at the domicile of the creditor of the garnishee.[6] More commonly, it has been held to be with the debtor.[7] When the question was first brought before the Supreme Court of the United States in *Chicago R. I. & P. Ry. Co.* v. *Sturm*,[8] that court held that a debt due a non-resident could be garnished at the residence of the debtor, but limited its decision to cases where the debt was not expressly payable elsewhere. This represents another view held by some courts of this country.[9] This view seems to have been modified by the Supreme Court in the leading case of *Harris* v. *Balk*.[10] The court in that case held that a debt due a non-resident could be garnished wherever the principal defendant could sue the garnishee, if the municipal law of the place allows the garnishment. Under this view it becomes unimportant that the place of payment is elsewhere. The only questions are whether the principal defendant could sue the garnishee and whether the law of that place allows the garnishment.

The early Missouri cases state the rule in this state to be that a debt due a non-resident is garnishable at the residence of the debtor (the garnishee) unless specially payable elsewhere.[11] The Supreme Court of Missouri, however, in *Wyeth Hardware & Mfg. Co.* v. *Lang & Co.*[12] adopted the view which has been laid down by the Supreme Court of the United States in *Harris* v. *Balk*, and expressly repudiated the qualification, made in the earlier cases, as to place of payment. This perhaps represents the present rule in Missouri[13] and the tendency of the modern cases on the subject.[14]

5. Minor, Conflict of Laws, § 125.
6. *Mason* v. *Beebee* (1890) 44 Fed. 556; *Louisville & N. R. Co.* v. *Nash* (1898) 118 Ala. 477, 23 So. 825; *Bullard* v. *Chaffee* (1900) 61 Neb. 83, 84 N. W. 604; and numerous cases cited in 69 Am. St. Rep. 117; Minor, Conflicts of Laws, § 125.
7. *Chicago, R. I. & P. Ry. Co.* v. *Sturm* (1899) 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797; *Bragg* v. *Gaynor* (1893) 85 Wis. 468, 55 N. W. 919; *Larkin* v. *Wilson* (1870) 106 Mass. 120; *Douglass* v. *Phoenix L. Ins. Co. of Brooklyn, N. Y.* (1893); 138 N. Y. 209, 33 N. E. 938, *Lancashire Ins. Co.* v. *Corbett* (1895) 62 Ill. App. 236; see also 20 Cyc. 1037, note 50.
8. (1899) 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797.
9. See the Missouri cases cited in note 11, *infra*. See also *Lawrence* v. *Smith* (1864) 45 N. H. 533; *Drake* v. *L. S. & M. S. Ry. Co.* (1888) 69 Mich. 168, 177, 37 N. W. 70; *Reimers* v. *Seatco Mfg. Co.* (1895) 70 Fed. 573; *L. & N. R. R. Co.* v. *Dooley* (1885) 78 Ala. 524; and cases cited in notes in 69 Am. St. Rep. 115, 3 L. R. A. N. S. 608, and 20 L. R. A. N. S. 264.
10. (1905) 198 U. S. 215, 49 L. Ed. 1023, 25 Sup. Ct. Rep. 625.
11. *Keating* v. *American Refrigerator Co.* (1888) 32 Mo. App. 293; *Fielder* v. *Jessup* (1887) 24 Mo. App. 91; *Green's Bank* v. *Wickborn* (1886) 23 Mo. App. 663; *Todd* v. *Missouri Pac. Ry. Co.* (1888) 33 Mo. App. 110; *Walker* v. *Fairbanks & Co.* (1893) 55 Mo. App. 478.
12. (1893) 54 Mo. App. 147, (1895) 127 Mo. 242; 29 S. W. 1010.
13. *Howland* v. *C. R. I. & P. Ry. Co.* (1896) 134 Mo. 474, 478, 363 S. W. 29 seems to misstate the rule of *Wyeth Hardware & Mfg. Co.* v. *Lang & Co.*
14. *Cross* v. *Brown, Streese and Clarke* (1845) 19 R. I. 220, 33 Atl. 147; *Mooney* v. *Buford etc. Mfg. Co.* (1896) 72 Fed. 32; *Mooney* v. *U. P. R. Co.* (1882) 60 Ia. 346; 20 Cyc. 1037 note 51; and cases cited in Minor, Conflict of Laws, § 125.

It would seem on principle that each of the views taken is unsound. The question is not one of determining the situs of the chose in action. From the nature of the thing it is incapable of having a situs anywhere. A debt is a common instance of a chose in action. The creditor merely has a right to compel payment by the debtor, and the debtor is subject to an obligation to pay. "It is a mere forced relation between the parties which can have no real existence anywhere."[15] The court to allow garnishment of the debt must have control over it. That involves power to require payment and a release of the debtor. The court, then, should have jurisdiction of both the debtor and the creditor. This difference in the requirements for jurisdiction between corporeal chattels and choses in action does justice between the parties. The man who leaves behind a chattel without a caretaker who would know of its seizure, impliedly consents that it may be dealt with on proper notice by publication. No one would think of leaving a caretaker of a debt. Injustice under the cases may be done the principal debtor in that the garnishment proceeding may be brought in a distant state so he will not receive notice and if he should receive notice, would be unable, because of the expense, to produce witnesses to prove the invalidity of the claim.

Under the rule of the cases injustice may also be done the garnishee. It is submitted that the law of garnishment should be so worked out that a garnishee will be protected against a possibility of having to pay the same debt twice. To absolutely protect him the court must have jurisdiction of both parties so that when payment has been made the creditor may be required to release him. The debt is then extinguished and there can be no recovery on it anywhere. Where jurisdiction of only one party is had no such extinguishment can take place. The Supreme Court of the United States has held that a judgment against a garnishee in one state where service has been had upon him is valid and must be recognized and given full faith and credit, in any other state.[16] This, however, does not adequately protect the garnishee. If he be found in any foreign country, he may be sued and a recovery had for the amount of the debt. The proceeding to which he was not a party is not *res judicata* as to him. He may be protected in equity if that court can get jurisdiction over the principal defendant and the garnishee can prove the actual existence of the debt claimed by the garnishing party. There may be cases in the United States where the courts cannot protect the garnishee from having to pay the debt twice. Such a case would arise where the court in the garnishment suit decided the debt belonged to the principal defendant and in another suit it is proved the real owner of the debt is some one else. The court in the second suit must give judgment against the garnishee.[17] Such, however, would be true under any view.

15. 27 Harvard Law Review 115.
16. *Harris* v. *Balk* (1905) 198 U. S. 215; 49 L. Ed. 1023, 25 Sup. Ct. Rep. 625. Cf. *Western Insurance Co.* v. *Walden* (1911) 238 Mo. 49, 141 S. W. 595.
17. *Ward* v. *Boyce* (1897) 152 N. Y. 191, 46 N. E. 180; 27 Harvard Law Review 121.

The holdings of the courts are due to a disregard of the real nature of garnishment suit. It is treated as a suit *in personam* against the garnishee. It was originally a proceeding *in rem* against property of the principal debtor in the hands of the garnishee. In treating it as a personal action against the garnishee a few courts have gone so far as to hold that the personal appearance of the garnishee waives any defects in the service.[18] Treating the proceeding as *in rem*, the court would acquire no jurisdiction under a defective service and nothing the garnishee could do would have any effect in giving the court jurisdiction. Such seems to have been the holding of the early Missouri cases.[19]

In the recent Missouri case of *Schroeder Wine & Liquor Co.* v. *Willis Coal & Mining Co.*,[20] it was admitted that the court had general jurisdiction over the debt, but the court held the exemption laws of Illinois where the debt was contracted were effectual to prevent garnishment of a portion of it. The question is one which does not seem to have squarely arisen in Missouri before. In *Fielder* v. *Jessup*,[21] the St. Louis Court of Appeals said that "the debt sued for was presumably contracted in that state (Illinois) and subject to its laws which form a part of the contract. The probability is that the debt sought to be attached is exempt from attachment." The same question was dismissed with a similar statement in *Todd* v. *Missouri Pac. Ry. Co.*,[22] citing the former case. These statements would seem to indicate that the court considered the exemption laws to be a part of the contract and subject to the *lex loci contractus*. *Schroeder Wine & Liquor Co.* v. *Willis Coal & Mining Co.* is justifiable under such a view. Some jurisdictions have adopted a similar rule.[23] They are in the minority. It has been made the rule in Illinois by statute.[24]

Professor Minor has suggested that on principle "if the law of the debtor's domicile permits a less exemption than the *lex fori*, the law of that domicile should govern; while the *lex fori* will govern if the *lex domicilii* of the debtor authorizes a greater exemption than the *lex fori*."[25] He admits authority does not support the view. It is difficult to see a reason for such a difference. It would seem the general rules of conflict of laws should apply. The *lex fori* should govern the remedy in all cases, and the *lex loci contractus* should apply as to the substantive law of contracts.[26]

18. *Western Stoneware Co.* v. *Pike Co. Etc. Co.* (1913) 172 Mo. App. 696, 155 S. W. 1083; *Dodge* v. *Knapp* (1905) 112 Mo. App. 513, 87 S. W. 47; *Coffee* v. *Haynes* (1899) 124 Col. 561, 57 Pac. 482; *Dooley* v. *Miles* 101 Ga. 797, 28 S. E. 118; *Baltimore, O. & C. R. R. Co.* v. *Taylor* (1881) 81 Ind. 24.

19. *Gates* v. *Tusten* (1886) 89 Mo. 13, 14 S. W. 287; *Haley* v. *Hannibal & St. J. R. R. Co.* (1883) 80 Mo. 112; *Fletcher* v. *Wear* (1884) 81 Mo. 524; *Masterson* v. *Missouri Pacific Ry. Co.* (1886) 20 Mo. App. 653. Cf. *Hathorn* v. *Robinson* (1903) 98 Me. 334, 56 Atl. 1057.

20. (1913) 179 Mo. App. 93, 161 S. W. 352.

21. (1887) 24 Mo. App. 91.

22. (1888) 33 Mo. App. 110.

23. *Mason* v. *Beebee* (1890) 44 Fed. 556; *Singer Mfg. Co.* v. *Fleming* (1894) 39 Neb. 679, 58 N. W. 226; *Drake* v. *L. S. & M. S. Ry. Co.* (1888) 69 Mich. 168, 37 N. W. 70; *Illinois Cent. R. Co.* v. *Smith* (1893) 70 Miss. 344, 12 So. 461; *Mo. Pac. Ry.* v. *Sharitt* (1890) 43 Kan. 375, 23 Pac. 430; *Baylies* v. *Haughton* (1843) 15 Vt. 626.

24. Hurd's Illinois Revised Statutes 1903, p. 1015, § 34.

25. Minor, Conflict of Laws, § 209.

26. Wharton, Conflict of Laws (3 ed.) 884, 1432; *Stevens* v. *Brown* (1892) 20 W. Va. 450, 460.

The same learned writer above quoted suggests as a practical test to determine whether a law relates "to the obligation or to the remedy merely, is to examine whether the legislature of the state whose law governs the obligation of the contract could, by enactment subsequent to the execution of the contract, make applicable to it a law similar to that sought to be enforced in the forum."[27] If such a law does not impair the obligation of the contract it relates to the remedy. The Missouri courts have held that an increase of exemption impairs the obligations of contracts.[28] The exemption then would be a part of the contract and governed by the *lex loci contractus* which in the principal case was the law of Illinois. The holding of the Supreme Court of the United States in *Edwards* v. *Kearzey*[29] strikes at the validity of the test. The court there held that a change of the remedy which substantially affected the value of the obligee's right is an impairment of the obligation of the contract. The St. Louis Court of Appeals in the principal case based its decision on comity between states. It is not stated where the residence of the plaintiff was. If plaintiff was a resident of Missouri, it would seem that no law of comity would require a court of this state to give effect to exemption laws of another state to the prejudice of citizens of this state. Even where the creditor and the debtor are both non-residents the rule of comity between states would not require recognition of exemption laws of other states—they being matters of procedure or remedy.

The better view would seem to be that followed in the majority of American jurisdictions, that exemption laws relate to the remedy and the *lex fori* applies, not the *lex loci contractus*.[30] K. B.

ATTORNEY AND CLIENT. CLIENT'S RIGHT TO SETTLE WITHOUT HIS ATTORNEY'S CONSENT. HAYES v. SHEFFIELD ICE CO.[1]—ATTORNEY'S LIEN LAW. ABBOTT v. MARION MINING CO.[2]—In *Hayes* v. *Sheffield Ice Co.*, pending an appeal by the defendant from a judgment for $4000 awarded the plaintiff below, the plaintiff compromised with the defendant's attorney for $1000 without consulting his own attorney who had a contract for 50 per cent of the proceeds of the litigation. The plaintiff's release was filed in the circuit court and plaintiff's attorney moved to set it aside. The motion was denied and he appealed. The Kansas City

27. Minor, Conflict of Laws, §§ 180 and 209.
28. *Cunningham* v. *Gray* (1854) 20 Mo. 170; *Harvey* v. *Wickham* (1865) 23 Mo. 112; *Tally* v. *Thompson* (1855) 20 Mo. 277; *Berry* v. *Ewing* (1886) 91 Mo. 395; 3 S. W. 877.
29. (1877) 96 U. S. 595, 24 L. Ed. 793.
30. *Chicago R. I. & Pac. Ry. Co.* v. *Sturm* (1899) 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797; *Stevens* v. *Brown* (1882) 20 W. Va. 450; *Mooney* v. *U. P. R. Co.* (1882) 60 Ia. 346, 14 N. W. 343; *Broadstreet* v. *Clark* (1885) 65 Ia. 670, 22 N. W. 919; *Morgan* v. *Neville* (1873) 74 Pa. 52; *Mineral Point R. R. Co.* v. *Barron* (1876) 83 Ill. 365; *Burlington & M. R. R. Co.* v. *Thompson* (1884) 21 Kan. 180, 1 Pac. 622; *Atchison T. & S. F. R. Co.* v. *Maggard* (1895) 6 Colo. App. 85, 39 Pac. 985. See also cases cited in notes in 19 L. R. A. 578 and 67 L. R. A. 222.

1. (1914) 168 S. W. 294.
2. (1914) 255 Mo. 378, 164 S. W. 563.

Court of Appeals also denied the motion. Johnson, J., dissented and certified the case to the Supreme Court on another ground.

The attorney is the accredited agent of the client and the latter is bound by his acts in the absence of fraud.[3] The agency extends to the control and management of the cause of action in and out of court, permitting the attorney to do all things incidental to the prosecution of the suit which affect the remedy only and not the cause of action.[4] He may dismiss or discontinue a suit,[5] but he has no authority merely from his employment to compromise his client's cause of action.[6] In England the rule is in accord with the minority view in this country, that an attorney is a general agent and can compromise.[7] As an attorney in the United States can do all things that pertain to the remedy and not to the cause of action, a dismissal which he is allowed to make should be carefully distinguished from a compromise. But in many jurisdictions a compromise may be made in an emergency when there is no time to consult the client and it is necessary in order to secure the greatest benefit to him.[8] In case an attorney does settle a suit without his client's consent, the latter has two alternatives; he may ignore the old suit and commence another,[9] or he may have the compromise set aside and the case re-instated.[10]

The client in all jurisdictions may compromise or dismiss the suit in the absence of fraud without his attorney's consent.[11] This is recognized in *Hayes* v. *Sheffield Ice Co.*, where the court said that since the judgment belonged to the plaintiff and not to his lawyers, he might legally settle the cause without their knowledge or consent, provided he acted in good faith and not for the purpose of defrauding them. This is the established rule in Missouri.[12] A settlement fraudulently made will be set aside at the instance of the injured party.[13] An agreement for a contingent fee does not affect this rule. The common law theory that such an agreement is champertous no longer prevails in this country,[14] and a statute in Missouri

3. *McDonough* v. *Daly* (1877) 3 Mo. App. 606; *State* v. *Lewis* (1880) 9 Mo. App. 321; *Vaughn* v. *Fisher* (1888) 32 Mo. App. 29.
4. *Davis* v. *Hall* (1886) 90 Mo. 659, 3 S. W. 382; *Willard* v. *Seigel Gas Fixture Co.* (1891) 47 Mo. App. 1.
5. *Davis* v. *Hall, supra.*
6. *Barton Bros.* v. *Hunter* (1894) 59 Mo. App. 610; *Bay* v. *Trusdell* (1902) 92 Mo. App. 377; *Kelley* v. *C. & A. R. R. Co.* (1905) 113 Mo. App. 468, 87 S. W. 583; *Grant City* v. *Simmons* (Mo. App. 1913) 151 S. W. 187; *Black* v. *Rogers* (1882) 75 Mo. 441.
7. *Butler* v. *Knight* (1867) 2 Exch. 109.
8. *Union Life Ins. Co.* v. *Buchanan* (1884) 100 Ind. 63; *Brockley* v. *Brockley* (1888) 122 Pa. St. 1, 115 Atl. 646; *In re Heath's Will* (1891) 83 Ia. 215, 48 N. W. 1037.
9. *Jones* v. *Inness* (1884) 32 Kan. 177, 4 Pac. 95.
10. *Dalton* v. *West End R. R. Co.* (1893) 159 Mass. 221, 34 N. E. 261.
11. *Plummer* v. *Great Northern R. R. Co.* (Wash., 1910) 110 Pac. 989; *Desaman* v. *Butler Bros.* (Minn. 1912) 136 N. W. 747; *Bell* v. *Board of Com. of Lake County* (Colo., 1914) 141 Pac. 861.
12. *Kersey* v. *Garton* (1883) 77 Mo. 645; *Reynolds* v. *Clark* (1901) 162 Mo. 680, 63 S. W. 382; *Whitewell* v. *Aurora* (1909) 139 Mo. App. 597, 123 S. W. 1045; *Hurr* v. *Metropolitan St. R. R. Co.* (1910) 141 Mo. App. 217, 124 S. W. 1057.
13. *Austin* v. *St. Louis Transit Co.* (1905) 115 Mo. App. 146, 91 S. W. 450; *St. Louis, etc. R. R. Co.* v. *Nichols* (Ark., 1913) 136 Pac. 159; *Wisconsin Steel Co.* v. *Dixon* (1914) 167 S. W. 682.
14. *Taylor* v. *Bemiss* (1884) 110 U. S. 42; *Duke* v. *Harper* (1876) 2 Mo. App. 1, affirmed (1877) 66 Mo. 51; *N. W. Development Co.* v. *Cochran* (1911) 191 Fed. 146.

gives an attorney the right to contract with his client for a certain percentage or portion of the proceeds of the suit.[15]

The effect of such a compromise upon the lawyer's fees differs in various jurisdictions. Generally, the contingent fee operates as an equitable assignment of that portion of the judgment, and the attorney may recover it as such.[16] It has priority over subsequent assignment by the client, notwithstanding the fact that the assignee had no notice of it.[17] It also takes precedence of a subsequent garnishment of the judgment debtor.[18] As an equitable assignment, it attaches as soon as judgment is entered. In case of a compromise the attorney gets his per cent of the amount gained by the compromise and not that per cent of the judgment.[19] And this is the rule in Missouri although a few cases would give the impression that a per cent of the judgment is recoverable by the attorney.[20] If the case is dismissed without consideration in Kentucky, the attorney gets nothing.[21] But in Texas it was held that though the client compromised the suit without his attorney's consent, the attorney was entitled to recover the whole amount of his contingent fee as if the contingency had happened.[22] In Oklahoma, the attorney is not limited to a per cent of the amount obtained through compromise without his consent, but is entitled to a per cent of the judgment to which his client was entitled.[23]

A contract between an attorney and client containing a stipulation that the client shall not compromise without the attorney's consent is void in many jurisdictions.[24] The reason is that if allowed it would confer upon one occupying a position of trust toward another, an unusual power over the latter in the management and disposition of his property, and also that it would be against public policy since it would tend to prevent settlement and adjustment of litigation. It has been held in these jurisdictions that if the contract is neither *malum prohibitum* nor *malum in se*, compensation may be had under *quantum meruit*.[25] In other states the stipulation does not render the whole contract void and the attorney may recover his per cent of the amount obtained.[26] In Missouri such a

15. Revised Statutes 1909, § 965.
16. *Terney* v. *Wilson* (1883) 45 N. J. L. 282, *Canty* v. *Latterman* (1883) 31 Minn. 239, 17 N. W. 383, accord; *Holmes* v. *Bell* (1910) 124 N. Y. S. 301, 139 App. Div. 453, *affirmed* (1911) 94 N. E. 1094, *contra*.
17. *Fairbanks* v. *Sargent* (1887) 104 N. Y. 108, 9 N. E. 870.
18. *Schubert* v. *Herzberg* (1896) 65 Mo. App. 578.
19. *Elhinney* v. *Kline* (1878) 6 Mo. App. 94; *Duke* v. *Harper*, *supra*; *Reynolds* v. *Clark*, *supra*; *Hurr* v. *Met. R. R. Co. supra*; *Stephens* v. *Met. R. R. Co.* (Mo., 1911) 138 S. W. 904; *McCall* v. *Atchley* (Mo., 1914) 164 S. W. 593.
20. *Kersey* v. *Garton* (1883) 77 Mo. 645; *Cosgrove* v. *Burton* (1904) 104 Mo. App. 698, 78 S. W. 677.
21. *Evans* v. *Bell* (1838) 1 Dana 479.
22. *Hill* v. *Cunningham* (1860) 25 Tex. 25.
23. *Herman Const. Co.* v. *Wood* (1913) 128 Pac. 309.
24. *North Chicago R. R. Co.* v. *Ackley* (1897) 171 Ill. 100, 49 N. E. 222; *Davis* v. *Weber* (1899) 66 Ark. 190, 49 S. W. 822; *Davis* v. *Chase* (1902) 159 Ind. 242, 64 N. E. 88; *In re Snyder* (1907) 90 N. Y. 66, 82 N. E. 742; *Davy* v. *Fidelity Ins. Co.* (1908) 78 Oh. St. 256, 85 N. E. 504; *Howard* v. *Ward* (S. D., 1913) 139 N. W. 771; *Cochran* v. *Henry* (Miss., 1914), 60 So. 213.
25. *Davis* v. *Weber*, *surpa*.
26. *Potter* v. *Ajax Mining Co.* (1900) 22 Utah 273, 61 Pac. 999; *Smits* v. *Hogan* (1904) 35 Wash. 290, 77 Pac. 390; *Granat* v. *Kruse* (1904) 114 Ill. App. 488.

stipulation is not necessarily against public policy and void, and when the question has arisen the whole contract has been held valid.[27] The New York rule is otherwise as shown in the case of *In Re Snyder*[28] where the court held the whole contract invalid, but Bartlett, J., dissented saying, "The attorney should have a right to protect himself against a premature and ill-advised settlement. Such contracts are under the strict scrutiny and supervision of the courts and contain nothing contrary to public policy when made in good faith. There is no reason why the client should not have the power to waive his right to make a settlement." This may serve to justify the Missouri rule if a justification is necessary.

It is well settled that an attorney may legally settle with the opposite party directly and without the consent of that party's counsel. This is admitted in the case under discussion, though the ethics of such a settlement is questioned by Johnson, J., in his dissenting opinion.

The question of attorney's lien did not arise in *Hayes* v. *Sheffield Ice Co.*, because the defendant's attorney was careful to provide for the plaintiff's counsel. If the compromise had not contained the agreement to pay plaintiff's attorney, the latter would have had a lien on the judgment for which the defendant would have been liable. By statute in Missouri,[29] attorneys are protected by allowing them a lien upon the judgment for their fees and costs. At common law no such lien existed.[30] This statute does not prevent the client from exercising the same control over the cause of action as he formerly did; it merely secures the attorney's fees in all cases, whether of compromise or of settlement.[31] There are two sections to the Attorney's Lien act, both providing that the lien attaches from the commencement of the action to a judgment in the client's favor or to any proceeds derived. This act has no retroactive effect,[32] and therefore does not attach to a judgment rendered before its enactment. Under the first section of this act no notice of the lien is required to be given the defendant, so that the lien attaches from the beginning of the suit, the mere institution of the suit being sufficient to make the defendant liable for compromising without regard to the attorney's rights.[33] Under the second section, however, the lien depends upon timely notice to the defendant. Thus if a percentage contract exists between attorney and client and the required notice thereof is given, such agreement operates from service of notice as a lien upon the claims and proceeds of any settlement.[34] The parties by a settlement cannot destroy this lien.[35] Under

27. *Lipscomb* v. *Adams* (1906) 193 Mo. 530, 91 S. W. 1046; *Taylor* v. *St. Louis Transit Co.* (1906) 198 Mo. 715, 97 S. W. 155; *Beagles* v. *Robertson* (1909) 135 Mo App. 306, 115 S. W. 1042.
28. (1907) 90 N. Y. 66. 82 N. E. 742.
29. Revised Statutes 1909, §§ 964, 965, enacted in 1901, Laws of 1901, p. 46.
30. *Frissell* v. *Haile* (1853) 18 Mo. 18; *Roberts* v. *Nelson* (1886) 22 Mo. App. 28; *Alexander* v. *Grand Ave. R. R. Co.* (1893) 54 Mo. App. 66; *Imboden* v. *Renishaw* (1903) 102 Mo. App. 173, 73 S. W. 701.
31. *Curtis* v. *R. R. Co.* (1906) 118 Mo. App. 341, 94 S. W. 762.
32. *Imboden* v. *Renishaw, supra.*
33. *Young* v. *Transit Co.* (1904) 109 Mo. App. 235, 84 S. W. 184; *Taylor* v. *Transit Co.* (1906) 198 Mo. 715, 97 S. W. 155; *Wait* v. *R. R. Co.* (1907) 204 Mo. 491, 103 S. W. 60; *Taylor* v. *R. R. Co.* (1907) 207 Mo. 495, 105 S. W. 740.
34. *Wait* v. *R. R. Co., supra.*
35. *Nicola* v. *American Car Foundry Co.* (Mo., 1914) 170 S. W. 366.

these circumstances if the attorney has a contract for half the proceeds, he is entitled to that per cent of any settlement made before judgment has become final, but if the compromise is made after judgment has become final, or for the purpose of defrauding the attorney, he is entitled to one-half of the judgment.[36] The act provides no means for enforcing the lien, but the attorney when his rights have been disregarded may move the court to set aside the satisfaction and award execution to the extent of his lien.[37] He may also proceed with an independent action, not strictly to enforce the lien but to recover the amount by reason of the defendant's failure to recognize it.[38] The attorney in this action need show no proof of merit in his client's claim, and the fact that the client is solvent and willing to pay constitutes no bar to the action.[39] The lien is subject to the defendant's right of set-off in all cases.[40] The most recent decision on this question of lien is in the case of *Abbott* v. *Marion Mining Co.*,[41] where it was decided that the lien attaches to a judgment rendered after the statute took effect, although the action was commenced prior to its enactment. G. L. D.

WAIVER OF PRIVILEGE AS TO COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT. STATE v. LONG.[1]—At common law there was no privilege as to communications between physician and patient. The Missouri statute[2] provides that a physician shall be incompetent to testify concerning any information which he may have acquired from a patient while attending him professionally, if the information was necessary to enable him to prescribe for the patient as a physician or to do any act for him as a surgeon. In an early case, *Harriman* v. *Stowe*,[3] the statute was construed as disqualifying physicians absolutely and the plaintiff was not allowed to use the testimony of his physician. But this was overruled in *Groll* v. *Tower*,[4] which held that the statute was for the patient's benefit and that he might waive his rights under it. The later cases established the view that it creates a privilege which may be waived. This is the rule in other states.[5] The purpose of the statute is stated to be the protection of patients from a disclosure of the secrets revealed to physicians

36. *Curtis* v. *R. R. Co.* (1906) 118 Mo. App. 341, 94 S. W. 762.
37. *Imboden* v. *Renishaw, supra; Younge* v. *Transit Co., supra; Curtis* v. *R. R. Co., supra; Wait* v. *R. R. Co., supra.*
38. *O'Connor* v. *Transit Co.* (1906) 198 Mo. 622, 97 S. W. 150: *Taylor* v. *Transit Co., supra; Wait* v. *Transit Co., supra.*
39. *Younge* v. *Transit Co., supra.*
40. *State ex rel.* v. *Fidelity etc. Co.* (1909) 135 Mo. App. 160; 115 S. W. 1081; *Wabash R. R. Co.* v. *Bowring* (1903) 103 Mo. App. 158, 77 S. W. 106.
41. (1914) 255 Mo. 378.

1. (1914) 238 Mo. 199, 165 S. W. 748.
2. Revised Statutes 1909, § 6362; enacted in 1835, Revised Statutes 1835, p. 623.
3. (1874) 57 Mo. 93.
4. (1884) 85 Mo. 249.
5. *Marx* v. *Manhattan R. R. Co.* (1890) 10 N. Y. S. 159; *Fulsom* v. *Mitchell* (1913) 27 Okla. 575, 132 Pac. 1103; *Dalton* v. *Albion* (1885) 57 Mich. 575, 24 N. W. 786; *Insurance Co.* v. *Wiler* (1884) 100 Ind. 92; *Missouri River Co.* v. *Daniels* (1911) 98 Ark. 352, 136 S. W. 651.

to enable them properly to prescribe for the patients' diseases, it being thought that free disclosure of such secrets would tend to destroy the confidential relationship with its attendant advantages.[6] Professor Wigmore contends that there is no sound reason for the statute, that it accomplishes no useful purpose and that it is only a hindrance in legal proceedings.[7]

The privilege may be waived expressly by contract,[8] or impliedly by conduct. The implication may result from the patient's testimony or from his conduct in permitting his physician to testify.

First, where the patient in his testimony discloses confidential communications. In *Webb* v. *Metropolitan Street Railway Co.*,[9] an action for personal injuries, the patient-plaintiff, in her direct examination, in order to prove that she had not had prior to her injury a predisposition to miscarry, testified that she had been treated by Dr. A, Dr. B, and Dr. C at different times prior to the suit and that the treatment was not for any ailment indicating falling of the womb. The Kansas City Court of Appeals held that the patient by her testimony had waived her privilege as to her relations with Drs. A, B, and C and that the defendant should have been allowed to show by the physicians named that the patient had been treated for falling of the womb. The decision was put on the ground that the statute is to protect the patient but not to close the mouths of physicians whose silent testimony she had used to fortify her case; that the reason for the rule had failed and that the rule should also fail. In *Highfill* v. *Missouri Pacific Ry. Co.*,[10] decided by the same court, the plaintiff testified in his direct examination that a certain physician had treated him and that he had examined him and found a bruise on his back. It was held on the authority of *Webb* v. *Metropolitan Street Railway Co.*, that the testimony of the physician when offered by the defendant should have been admitted.[11]

In *Epstein* v. *Pennsylvania R. R. Co.*,[12] which is the leading case on the construction of the privilege statute, the plaintiff-patient in his direct examination testified that he had been treated at a hospital by Dr. E and related in detail his communications with and treatment by the physician. The defendant offered the testimony of two of Dr. E's assistants in the hospital who were present and working with Dr. E in his treatment of the plaintiff. The court construed the statute to mean

6. *Edington* v. *Insurance Co.* (1876) 67 N. Y. 185, approved in a number of Missouri cases.
7. Wigmore, Evidence, § 2381.
8. *Keller* v. *Insurance Co.* (1902) 95 Mo. App. 627, 69 S. W. 612; *Modern Woodmen* v. *Angle* (1907) 127 Mo. App. 107; *Foley* v. *Arcanium Association* (1896) 151 N. Y. 196, 45 N. E. 456; *Andreveno* v. *Mutual Loan Association* (1888) 34 Fed. 470.
9. (1901) 89 Mo. App. 610.
10. (1902) 93 Mo. App. 223.
11. *Marx* v. *Manhattan R. R. Co.* (1890) 56 Hun 575, 10 N. Y. S. 159; *Fulsom* v. *Mitchell* (1913) 37 Okla. 575, 132 Pac. 1103; *Roeser* v. *Pease* (1913) 37 Okla. 222, 131 Pac. 534; *Fox* v. *Union Turnpike Co.* (1901) 69 N. Y. S. 551, *accord*. *Green* v. *Nebagaman* (1902) 113 Wis. 508, 89 N. W. 520, *contra*.
12. (1913) 250 Mo. 1, 156 S. W. 699.

"that when a litigant breaks the seal of confidence and secrecy and waives it as to A then by the same token it is broken and waived as to B and C who bore the same relation to him as did A." The basis for the decision was that the statute serves only as a shield, not as a sword and that the patient's voluntary testimony on matters which he might have refused to disclose took away the reason for their non-disclosure not only by the physician referred to by the patient but also by physicians having knowledge of the identical facts and standing in the same relation to the patient. A minority of the court urged that since the plaintiff-patient was given the right by statute to testify in his own behalf and by the privilege statute the right to object to the testimony of his physician, that the exercise of one right did not destroy the other; that there is nothing in the statute warranting the holding, and that the statute which was intended to protect the plaintiff should be liberally construed in his favor.

It is held that general statements by the patient do not constitute a waiver[13] and in some states it is held that if the patient's testimony, relied on as constituting waiver, is brought out on cross-examination it is not a waiver,[14] on the ground that the testimony was involuntary inasmuch as a refusal by the patient to so testify would tend to prejudice his case before the jury.

Second, where the patient discloses through one physician facts known to another. The plaintiff-patient in *Mellor* v. *Missouri Pacific Ry. Co.*,[15] following his injury had been attended for several months by Dr. A. Dr. B, who had attended the plaintiff after Dr. A, was introduced as a witness by the plaintiff to prove the nature and extent of his injuries. The defendant offered Dr. A's testimony but this was excluded by the trial court and the ruling approved by the Supreme Court on the ground that the statute places a bar on certain witnesses and does not exclude the testimony by reason of its inherent character. In *Smart* v. *Kansas City*,[16] the patient sought to prove as an element of her damages that the necessity for the amputation of her leg had been due to the injury complained of. She had, four years before the injury, suffered from tuberculosis of the knee and had been operated on by Dr. G who testified concerning the operation. The defendant offered the testimony of several physicians who examined patient's knee following her injury and some of whom

13. *Dunckle* v. *McAllister* (1902) 74 N. Y. S. 902; *Fox* v. *Union Turnpike Co.* (1901) 69 N. Y. S. 551; *Edwards* v. *St. L. & S. F. R. R. Co.* (1912) 166 Mo. App. 428, 149 S. W. 321.

14. *Lawson* v. *State* (1912) 92 Neb. 24, 137 N. W. 894; *Kelly* v. *Andrews* (1900) 102 Iowa 119, 71 N. W. 251; *May* v. *Northern Pacific R. R. Co.*, (1905) 32 Montana 522, 81 Pac. 328.

15. (1891) 105 Mo. 455, 16 S. W. 849; *Missouri River Co.* v. *Daniels* (1911) 98 Ark. 352, 136 S. W. 651; *Jones* v. *Caldwell* (1911) 20 Idaho 5, 116 Pac. 110; *Burgess* v. *Sims Drug Co.* (1901) 114 Iowa 275, 86 N. W. 307; *Slater* v. *Souge* (1909) 166 Mich. 173, 131 N. W. 565; *Hope* v. *The Railroad* (1888) 110 N. Y. 643, 17 N. E. 873; *Barker* v. *Cunard Steamship Co.* (1895) 36 N. Y. S. 256; *Tracy* v. *Metropolitan Railroad* (1901) 168 N. Y. 653, 61 N. E. 1135, *accord.*

16. (1907) 208 Mo. 162, 105 S. W. 709.

were present during the amputation, and offered to show by them that it was not the injury by the defendant that rendered the amputation necessary. The testimony was excluded. It was urged that a waiver resulted from bringing the action. It was held that such a rule would abrogate the statute and that the testimony was properly excluded. The effect of any of the evidence upon the privilege was not touched upon in the majority opinion but a minority of the court thought that the patient by tendering to the jury the issue as to the condition of her knee both before and after the injury and by introducing as a witness one out of a number of physicians who had examined her knee, waived her privilege as to any of her other physicians in relation to the same subject-matter. In speaking of this case, Faris, J., in *Epstein* v. *Pennsylvania R. R. Co.*, stated the facts to be that Dr. C who performed the amputation was called by the defendant and allowed by the plaintiff to testify, and in comparing it with *Epstein* v. *Pennsylvania R. R. Co.* it was said that the only difference was that the physician instead of the plaintiff testified as to the patient's treatment; the conclusion was stated that in principle there was no difference in the two cases and that the assistant physicians in *Smart* v. *Kansas City* should have been allowed to testify as was held in *Epstein* v. *Pennsylvania R. R. Co.* The official report of *Smart* v. *Kansas City* does not disclose the facts as they were stated by Faris, J., nor does it appear that there was any testimony from any physician who had examined the patient after her injury by the defendant. It seems that the decision in *Smart* v. *Kansas City* was simply that the bringing of an action for an injury does not constitute a waiver. In *O'Brien* v. *Western Implement Co.*,[17] plaintiff had two physicians attending his injuries one of whom was introduced and testified as to such injuries. It was held that the defendant might introduce the other physician. It does not appear whether the physicians treated the patient at the same time or different times but the court relied upon *Morris* v. *N. Y., etc., R. R. Co.*,[18] a case where the physicians were present at the same time.

In *Epstein* v. *Pennsylvania R. R. Co.*, besides the patient's testimony constituting waiver, which phase of the case was considered above, there was also the fact that the defendant without objection from the patient introduced as a witness Dr. E, who testified as to the extent and nature of the patient's injuries. The court in reviewing the decisions bearing on the general subject of waiver pointed out that in principle there was no difference between cases where the patient revealed the privileged matter and those where his physician did so and said that the privilege was waived in both those cases.[19] This view was not taken by Woodson,

17. (1910) 141 Mo. App. 331, 125 S. W. 805.
18. (1895) 148 N. Y. 92, 42 N. E. 579.
19. See also *Rauh* v. *Deutcher Verein* (1898) 51 N. Y. S. 985; *McKinney* v. *Grand Street R. R. Co.* (1887) 104 N. Y. 352, 10 N. E. 544; *Morris* v. *The Railroad* (1895) 148 N. Y. 92, 42 N. E. 579.

J., who contended for a strict construction of the statute and for the rule that the statute disqualified one and all physicians and therefore the patient may protect that right by objecting to any one or all of such incompetent physicians and that the failure to exercise the right as to one does not destroy his right as to others.[20]

In *Elliott* v. *Kansas City*,[21] the defendant in the first trial of the case introduced as a witness one of the patient's physicians without objection from the patient. In a second trial of the same cause between the same parties the defendant sought to again use as a witness the physician who had testified on the first trial. It was held that he should have been allowed to do so since a waiver once made stands until final adjudication. This decision has frequently been cited as supporting the doctrine that a waiver through a physician's testimony is a general one and that thereafter every vestige of the privilege is gone. But the case is not authority for such a proposition. In the cases previously discussed there was a question as to the extent of the waiver; in this case the question was whether a waiver of a known extent is a waiver only during the trial when it occurs or continues until the case is finally settled? The rule is that the privilege is waived in a second trial to the same extent as it was waived in the first trial. Such was the holding in *Elliott* v. *Kansas City*. Any other rule would prevent the correction of errors committed by a trial court in ruling that there had been no waiver when the appellate court finds a waiver. But cases with such an issue should not be confused with those wherein the initial extent of the waiver is to be determined.

State v. *Long*[22] was a prosecution for seduction. The state undertook, in order to show the good reputation of the victim of the alleged crime, to explain an operation performed prior to defendant's relations with her. The patient testified that Drs. A and B had treated her for "womb trouble"; that they had so termed her malady; that about a month thereafter Dr. C had performed an operation on her for "womb trouble"; and as to other confidential matters. The state also introduced Dr. C who testified to the same effect. The defendant offered to prove by both Dr. A and Dr. B that the real trouble with the patient was pregnancy, which offer was rejected. It was held that the testimony should have been admitted. There was a waiver of the patient's privilege by her testimony and the decision is sound when put on that basis. But

20. See also *Dalton* v. *City of Albion* (1885) 57 Mich. 575, 24 N. W. 786; *Baxter* v. *Cedar Rapids* (1902) 103 Iowa 599, 92 N. W. 790; *Pennsylvania Insurance Co.* v. *Miles* (1884) 100 Ind. 92.

21. (1906) 198 Mo. 607, 96 S. W. 1026. Accord—*In re Whiting* (1913) 110 Me. 232, 85 Atl. 791; *Pittsburg C. C. & St. L. R. R. Co.* v. *O'Connor* (1908) 17 Ind. 189, 85 N. E. 969; *Green* v. *Crapo* (1902) 181 Mass. 58, 62 N. E. 956; *McKinney* v. *Grand Street R. R. Co.* (1887) 104 N. Y. 352, 10 N. E. 544. Contra—*Burgess* v. *Sims Drug Co.* (1901) 114 Iowa 275, 86 N. W. 307; *Kelly* v. *Andrews* (1899) 102 Iowa 119, 71 N. W. 251. In the latter case *McKinney* v. *Grand Street R. R. Co.*, was distinguished on the ground that the fact constituting waiver was the testimony of a physician at the instance of the plaintiff while in this case the physician had been introduced as a witness by the defendant.

22. (1914) 257 Mo. 199, 165 S. W. 749.

it is doubtful whether there was a waiver as to Drs. A and B as a consequence of the state's using Dr. C as a witness, since the privilege is personal to the patient.

The cases are full of dicta which range from those holding that the privilege is waived by bringing an action to those holding there can be no waiver, but a rule which may be safely deduced from the decisions is, that a patient waives his privilege, first, by testifying as to confidential matters, second, by permitting his physician to testify as to confidential matters at his own or the adverse party's request and that such a waiver includes all physicians standing in the same relation to him as the one testifying or involved in the patient's testimony. Whether physicians do stand in the same relation to a patient must depend upon the facts of each case.[23]

L. W.

CONCLUSIVENESS OF JUDGMENT IN EJECTMENT. IDALIA REALTY AND DEVELOPMENT CO. v. NORMAN.[1]—In the recent case of *Idalia Realty and Development Co.* v. *Norman*, the question is again raised as to the conclusive character of a judgment in ejectment. A former suit in ejectment had been brought between the same parties for the same land, and the decision had turned upon the construction of the instrument under which the defendant claimed. The plaintiff had acted upon the theory that the instrument created a tenancy at will and had given the notice required by statute to terminate such a tenancy. The defendant contended that under the instrument he had become a tenant from year to year and that the notice given had not been sufficient under the statute. The court adopted the latter view and gave judgment for the defendant.[2] The plaintiff then gave the notice required to terminate a tenancy from year to year and brought a second ejectment suit in which the defendant changed his position and contended that the instrument in question was not a lease at all, but "the transfer of a beneficial interest in the land itself." No question of this nature had been raised in the previous suit. The court declares that the former adjudication upon the instrument was conclusive; that an ejectment suit, "when the title is in issue, and the right of possession only an incident, has all the consequences of an ordinary suit, when the parties are the same, the land is the same, and the evidence in support of the respective titles is the same."

The common law doctrine that a verdict and judgment in ejectment were neither final and conclusive as to the matters in issue nor a bar to any number of successive actions to recover the same land, was a consequence chiefly of the fictions that attended the proceeding and of its

23. *Epstein* v. *Pennsylvania R. R. Co.* (1913) 250 Mo. 1, 39. See 28 Harvard Law Review 116.

1. (Mo., 1914) 168 S. W. 749.
2. *Idalia Realty and Development Co.* v. *Norman* (1911) 232 Mo. 663, 135 S. W. 47.

purely possessory character.[3] The action was brought in the name of a fictitious lessee and the judgment was for the recovery of a term only; naturally the judgment was held to be no bar to a subsequent action based upon a different demise and brought in the name of another party, even though the real litigants were the same as in the former action. The action has now generally been freed by statute from these fictions and is required to be prosecuted by and against the real claimants. In many jurisdictions, the statutes, or the courts independently of statutory provisions, have made the judgment in ejectment, as in any other action, conclusive as between the parties and their privies of all matters actually and directly at issue.[4] Other jurisdictions, not going to this length, limit the number of actions that may be brought.[5]

The Missouri courts, in spite of the statutory[6] removal of the entry, lease and ouster fiction, have refused to take what seems the logical step of giving to a judgment in ejectment a conclusive effect. The cases so holding are numerous and their language unqualified. In *Slevin* v. *Brown*,[7] the first reported case involving this point, a previous judgment was held not to be a bar, the only reason assigned being the repeal in 1857 of a statutory provision of 1855[8] that judgments in ejectment should be final. This action of the legislature was treated by the courts in that and subsequent cases as equivalent to a declaration that such a judgment is not a bar to another action. In *Foster* v. *Evans*[9] it was stated that the previous judgment was no bar, unless the titles and defenses were precisely the same as in the first action. This suggestion that the judgment was final as to the titles litigated was promptly and decisively repudiated in *Kimmel* v. *Benna*[10] and later cases.[11] *Speed* v. *Terminal Railway Co.*[12] presents a situation much the same as that in the principal case. The rights of the parties, which depended upon the construction of a deed, had been adjudicated in the Federal courts where judgment was given

3. *Kimmel* v. *Benna* (1879) 70 Mo. 52, 62; *Stevens* v. *Hughes* (1858) 31 Pa. 381, 384; *Miles* v. *Caldwell* (1864) 2 Wallace 35; 2 Black, Judgments, § 650; Tyler, Ejectment, 585, 586. According to these authorities, the rule was also attributable to an unwillingness to permit land titles, which were looked upon with reverence, to be settled forever in one action.

4. This rule is followed in about twenty-seven American jurisdictions. *Sturdy* v. *Jackaway* (1866) 4 Wall. 174; *Caperton* v. *Schmidt* (1864) 26 Cal. 479; *Dawley* v. *Brown* (1880) 79 N. Y. 390; *Hentig* v. *Redden* (1891) 46 Kan. 231, 26 Pac. 701. See also collection of cases in 23 Cyc. 1329.

5. Alabama Code of 1907, § 3858; *Drexel* v. *Man* (1845) 2 Barr (Pa.) 271. See also 2 Black, Judgments, § 654.

6. Mo. Terr. Laws of 1807, c. 38, § 54, now replaced by Revised Statutes 1909, § 2385.

7. (1862) 32 Mo. 176.

8. Revised Statutes 1855, c. 58, § 33; repealed by Laws of 1857, p. 34.

9. (1872) 51 Mo. 39.

10. (1879) 70 Mo. 52.

11. *Hogan* v. *Smith* (1881) 11 Mo. App. 314; *Ekey* v. *Inge* (1885) 87 Mo. 493; *Avery* v. *Fitzgerald* (1887) 94 Mo. 207, 7 S. W. 6; *City of St. Louis* v. *Schulenberg and Boeckler Lumber Co.* (1889) 98 Mo. 613, 12 S. W. 248; *Spencer* v. *O'Neill* (1889) 100 Mo. 141, 13 S. W. 497; *Bailey* v. *Winn* (1890) 101 Mo. 649, 12 S. W. 1045; *Swope* v. *Weller* (1894) 119 Mo. 556, 25 S. W. 204; *Speed* v. *St Louis Terminal Railway Co.* (1901) 163 Mo. 111, 63 S. W. 393; *Crowl* v. *Crowl* (1906) 195 Mo. 338; 92 S. W. 890.

12. (1901) 163 Mo. 111, 63 S. W. 393.

for the defendant.[13] The plaintiff then instituted another action in the state court upon the same petition. The same defenses were introduced and the case tried solely upon the record of the former proceeding; nevertheless a plea of res judicata was unsuccessful, apparently being given little consideration. The cases agree, however, that, when an equitable defense is set up and the cause is tried and the plaintiff has judgment, such equitable defense is res judicata.[14] The decisions seem unquestionably to warrant the statement of Sherwood, J., in *Sutton* v. *Dameron*[15] to the effect that "the well settled rule of law in this state * * * is, actions of ejectment, though between the same parties, having the same defenses, concerning the same title and possession and in all respects similar in their facts, may be maintained ad infinitum, so long as equitable defenses are not interposed and ruled upon, thereby converting the whole proceeding into an equitable one, and then making the adjudication binding."[16] To avoid being harassed by successive suits upon the same title, the relief of equity must be sought in a bill of peace; or the same relief may be obtained in an ejectment suit at law by way of affirmative plea for equitable relief.[17]

In view of the unequivocal attitude which the Missouri courts have assumed with reference to the lack of finality of judgments in ejectment, it is difficult to find in previous decisions any support for the doctrine of the principal case, in so far as it gives the former judgment any conclusive effect whatever. Especially does it seem irreconcilable with *Speed* v. *Terminal Railway Co.*, mentioned above, where, though the parties, the land, and the evidence in support of the respective titles were the same, the former judgment was held not to be conclusive. The court cites *Potter* v. *Adams*[18] and *McAnaw* v. *Clark*[19] as supporting its view. In each of these cases, the action was brought before the court a second time by the same parties upon the same state of facts. The decisions, while rendered upon the authority of the previous cases without a reconsideration of the questions involved, are to be explained not upon the ground of res judicata but rather upon the principle of stare decisis, which requires the court, in like cases, to follow its previous decisions unless they are manifestly wrong. The result of the principal case could have been reached by the mere application of the latter principle and possibly the court intended to go no further than this. However desirable it may be that the adjudication of titles in ejectment suits should have the same character of finality as judgments in other actions, the Missouri decisions prior to *Idalia Realty and Investment Co.* v. *Norman* do not countenance such a doctrine. D. H. L.

13. (1898) 86 Fed. 235.
14. *Chouteau* v. *Gibson* (1882) 76 Mo. 38; *Preston* v. *Ricketts* (1886) 91 Mo. 320, 2 S. W. 793; *Emmel* v. *Hayes* (Mo., 1889) 12 S. W. 521, not officially reported. Cf. *Clark* v. *Bettelheim* (1898) 144 Mo. 258, 46 S. W. 135.
15. (1889) 100 Mo. 141, 13 S. W. 497.
16. See cases cited under note 11 supra.
17. *Primm* v. *Raboteau* (1874) 56 Mo. 407; *Swope* v. *Weller* (1893) 119 Mo. 556, 25 S. W. 204; *Potter* v. *Adams* (1898) 143 Mo. 665, 45 S. W. 1128.
18. (1898) 143 Mo. 665, 45 S. W. 1128.
19. (1902) 167 Mo. 443, 67 S. W. 249.

CONFLICT OF LAWS.—POWER OF FOREIGN TRUSTEE OF DOMESTIC LAND. DE LASHMUTT V. TEETOR.[1]—Since the jurisdiction of a sovereign depends upon its power, immovable property is subject to the exclusive jurisdiction of the courts of the state in which it is located.[2] Neither courts of law nor courts of equity can affect the title of foreign land, therefore. The refusal of courts of law to entertain suits for trespass to foreign land is anomalous. But a court of equity with personal jurisdiction may compel something to be done which will affect such title. Thus, specific performance may be decreed of a contract to convey foreign land, and where such a conveyance does not involve the performance of some act where the land is located, this jurisdiction is freely exercised in modern times.[3] Similarly, equity may order the sale of foreign lands under a mortgage, if the person having the power of sale is before the court;[4] and it may decree the foreclosure of a mortgage of foreign land.[5] The decree is such cases is *in personam* and does not directly affect the title. Jurisdiction, therefore, depends only upon the presence of the necessary parties before the court.

A court of equity should refuse to decree concerning foreign lands, though it has jurisdiction over the necessary persons, if a complete and effective performance might involve something to be done on the land itself. Thus, a decree for specific performance of a contract to convey foreign land should not be given where the conveyance involves livery of seisin. Conceivably, the court could order the defendant to do an act in a foreign state and punish him for not doing it; but unless he can be fully protected in doing the acts commanded, the jurisdiction should not be exercised. It is for this reason that suits for partition of foreign lands are not entertained.[6] But this reasoning does not apply to suits to cancel deeds to, or to remove clouds on titles to foreign lands;[7] in both, a personal decree ordering the defendant to convey or restraining his assertion of a hostile interest, will be effective relief; nothing needs to be done on the land, and since adequate and effective relief only demands that a person before the court be commanded to do something which may be done without his leaving the jurisdiction, it would seem that courts might entertain jurisdiction of suits to cancel deeds to, or to remove clouds on titles to foreign lands, but their decrees cannot in such cases affect the title to the land nor can they purge the registry of the infirmity complained of, if it has

1. (1914) 169 S. W. 34.
2. Dicey, Conflict of Laws (2d ed.) p. 40.
3. *Penn* v. *Baltimore* (1750) 1 Ves. Sr. 444; *Brown* v. *Desmond* (1868) 100 Mass. 267; *Davis* v. *Headley* (1871) 22 N. J. Eq. 115; *Cloud* v. *Greasley* (1888) 125 Ill. 313, 17 N. E. 826. See *Olney* v. *Eaton* (1877) 66 Mo. 563; *State ex rel. Hunt* v. *Grimm* (1912) 243 Mo. 667, 148 S. W. 868.
4. *Muller* v. *Dows* (1876) 94 U. S. 444.
5. *Mead* v. *N. Y. etc. R. R. Co.* (1877) 45 Conn. 199; *Williams* v. *Ayrault* (1860) 31 Barbour (N. Y.) 368; *Eaton* v. *McCall* (1894) 86 Me. 346, 29 Atl. 1103; *McTighe* v. *Macon Construction Co.* (1894) 94 Ga. 306, 21 S. E. 701.
6. *Johnson* v. *Kimbro* (1859) 3 Head (Tenn.) 781; *Wimer* v. *Wimer* (1888) 82 Va. 890, 5 S. E. 536.
7. *Remer* v. *Mackay* (1898) 35 Fed. 86. See also *Hart* v. *Sansom* (1883) 110 U. S. 151; 1 Wharton, Conflict of Laws (3d ed.) p. 650 et seq.

been recorded. Furthermore such decrees are entitled to recognition in other states as adjudications of the equitable rights and obligations of the parties. These principles were recognized by the Missouri court in *McCune* v. *Goodwillie*,[8] as to an Ohio decree ordering a reconveyance, though the decision in the case can be rested on estoppel. But in *State ex rel. Hunt* v. *Grimm*,[9] the same court issued a writ of prohibition to prevent a circuit court from taking jurisdiction of a suit to cancel a deed to lands located in Virginia, holding that the "cancellation of a recorded deed is an act which affects the title." The court seems to have been influenced by the fact that a Missouri statute[10] requires suits affecting title to be brought in the county where the land is located, but it is difficult to see how this statute ousts the Missouri courts of jurisdiction of suits concerning foreign lands. The fact that a similar suit was pending in Virginia was not relied on, nor does it seem to have been important.

Where by statute equity courts are given jurisdiction *in rem*, as in Missouri,[11] of course such jurisdiction can be exercised only when the *res* is in the state; but such a statute does not affect the personal jurisdiction of equity courts. Similarly, a statute[12] giving to a decree for a conveyance the effect of an actual conveyance, can have no extra-territorial force.

Clearly, there is no difficulty in directing a trustee of foreign lands to dispose of them as the equities may require.[13] A court may also declare a trust of lands situated in another state,[14] and this is true whether the object of the suit is to establish a resulting trust[15] or to have a defendant declared constructive trustee *ex maleficio*.[16] But a court cannot assume any jurisdiction over a trust to foreign lands unless the trustee with a legal title is before it and unless it acts by commanding him. In a Virginia case, *Barger* v. *Buckland*,[17] there being no trustee to perform the trust of lands in Virginia and West Virginia, the court designated certain persons to perform it by selling the lands in both states, but the case has been narrowly distinguished in subsequent decisions.[18] Where a trust instrument provided for the appointment of a new trustee "by a court of competent jurisdiction" if the designated trustee failed to act, the California court held[19] that it had jurisdiction to appoint such a trustee of foreign

8. (1907) 204 Mo. 306, 102 S. W. 997.
9. (1912) 243 Mo. 667, 148 S. W. 868. Lamm and Kennish, JJ., dissented.
10. Revised Statutes 1909, § 1753. This statute is held to require a suit to set aside a deed to be brought in the county where the land is located. *Castleman* v. *Castleman* (1904) 184 Mo. 432.
11. Revised Statutes 1909, § 2109.
12. Such as Revised Statutes 1909, § 2111.
13. *Vaughn* v. *Barclay* (1841) 6 Whart. (Penn.) 392; *McCurdy's Appeal* (1870) 65 Pa. 291.
14. *Massie* v. *Watts* (1810) 6 Cranch 148; *MacGregor* v. *MacGregor* (1859) 9 Iowa 65; *Clopton* v. *Booker* (1872) 27 Ark. 482.
15. *Moore* v. *Jaeger*, 2 McArthur (D. C.) 465.
16. *Butterfield* v. *Nogales Copper Co.* (1905) 9 Arizona 212, 80 Pac. 345.
17. (1877) 28 Gratt. 850.
18. *Poindexter* v. *Burwell* (1886) 82 Va. 507; *Roller* v. *Murray* (1907) 107 Va. 527, 59 S. E. 421.
19. *Smith* v. *Davis* (1891) 90 Cal. 25, 27 Pac. 26.

lands since the trust instrument was executed in California; but it is difficult to see how it was a "court of competent jurisdiction" for this purpose, and the new trustee could not have had a good title without a conveyance from his predecessor. If a new trustee is to be appointed for any reason, any court having personal jurisdiction over the old trustee may compel the old trustee to convey to the new trustee whom it designates, and the latter will take title by force of the conveyance.[20] But without an actual conveyance from the old trustee, the only court which can effectually clothe the new trustee with title and power to execute the trust, is the court of the state in which the land is located.

An analogy is to be found in the law of receivers. A receiver is an officer of the court which appoints him and his powers and authority are limited by the court's jurisdiction.[21] But the receiver will be permitted to act as such in other jurisdictions unless some reason why he should not be permitted is shown.[22] This practice is usually said to rest on comity,[23] but in fact it rests on the convenience which flows from having the same person handle the property in several jurisdictions without reappointment in each. Hence, it is not to be followed where it will interfere with the rights of domestic creditors. But a receiver cannot in any case deal with foreign lands without an actual conveyance of the title.[24]

The power of a court of equity to appoint a trustee of foreign lands was involved in the recent case of *De Lashmutt* v. *Teetor*.[25] A testamentary trustee of Missouri land had refused to act and a substitute had been appointed by a court of Maryland in the county in which the testator died domiciled. No conveyance had been made by the testamentary trustee to the substituted trustee and it was therefore held that the latter's deed passed no title. The decision recognizes the principles above stated.

R. BURNS.

RESULTING TRUSTS—HUSBAND'S PURCHASE OF LAND WITH WIFE'S MONEY. MOSS V. ARDREY.[1]—The common law gave a husband title to all of his wife's choses in possession and a right to reduce to possession her choses in action during her life.[2] The wife's separate ownership in equity was of modern origin. Recent legislation has conferred on the wife separate legal ownership of her personal property. The Missouri Married Women's Act, giving the wife separate property, provides that

20. Cf. *West* v. *Fitz* (1884) 109 Ill. 425.
21. *Farmers, etc. Insurance Co.* v. *Needles* (1873) 52 Mo. 17.
22. *Booth* v. *Clark* (1854) 17 Howard 322; 1 Wharton, Conflict of Laws (3d ed.) p. 836.
23. *Weil* v. *Bank of Burr Oak* (1898) 76 Mo. App. 34; *Seymour* v. *Newman* (1898) 77 Mo. App. 578; *State ex rel. Mutual Life Insurance Co.* v. *Denton* (1910) 229 Mo. 187, 129 S. W. 709. See also *Robertson* v. *Stued* (1896) 135 Mo. 135, 36 S. W. 60.
24. *Moseby* v. *Burrow* (1880) 52 Tex. 396.
25. (1914) 169 S. W. 34.

1. (1914) 169 S. W. 6.
2. *Hunt* v. *Thompson* (1875) 61 Mo. 148; Schouler, Personal Property (3d ed.), § 91.

it "shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife: Provided, that said personalty shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property, unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, encumber, or otherwise dispose of the same for his own use and benefit."[3] It would seem that the statutory written assent of the wife is then made necessary only where the husband attempts to get title to her property by reducing it to his possession with or without her oral assent, and that she being complete owner might deal with it and transfer to him freely without any other writing than is required by the statute of frauds. But the statute has been construed to require a written assent to evidence a gift.[4] No case has arisen in which the husband attempted to purchase his wife's goods for valuable consideration, and it is possible that such a transaction could be avoided by the wife against the husband or a transferee from him unless she had assented in writing. Where the wife's goods are taken by the husband without her consent, or with her consent if it is not evidenced by a writing, it would seem that she might treat him as a converter and sue in tort, though no case has so held; or she may treat him as a trustee of the property or as a debtor for its value, thereby affirming a transfer of the title.[5] But there is no reason why a husband cannot act as agent for his wife in handling or investing her property. It was at one time thought that his appointment for this purpose should be in writing,[6] but later decisions have acknowledged the error of such a construction of the statute.[7]

The power of the husband under the statute becomes very important when he purchases lands with money belonging to his wife. His title to her money is to be determined according to the results outlined in the above paragraph. The statute does not apply to realty, except to take away the husband's right to the possession and usufruct of his wife's lands during her life,[8] and his title to the land is to be determined wholly apart from it; but, in equity, the title to the land will be made to depend on his title to the money or his authority to use it. If the land is conveyed to the husband, the legal title will pass to him, but the equitable interest will be disposed of in accordance with the ownership of the purchase money. If all of the money was the wife's, the husband will be trustee for her of all the land;[9] if part of the money was hers, he will be trustee

3. Laws of 1875, p. 61. Now Revised Statutes 1909, § 8309.
4. *McGuire* v. *Allen* (1891) 108 Mo. 403, 18 S. W. 282.
5. *Columbia Savings Bank* v. *Winn* (1895) 132 Mo. 80, 33 S. W. 457; *Winn* v *Riley* (1899) 151 Mo. 61, 52 S. W. 27.
6. *MacFarland* v. *Heim* (1894) 127 Mo. 327.
7. *Long* v. *Martin* (1899) 152 Mo. 668, 54 S. W. 473; *Orchard* v. *Collier* (1903) 171 Mo. 390, 71 S. W. 677.
8. *Myers* v. *Hansbrough* (1906) 202 Mo. 495, 100 S. W. 1137.
9. *Scrutchfield* v. *Souter* (1893) 119 Mo. 615, 24 S. W. 137; *Alkine Grocer Co.* v. *Ballenger* (1896) 137 Mo. 369, 38 S. W. 911; *Broughton* v. *Brand* (1887) 94 Mo. 169, 7 S. W. 119.

for her of a proportionate part of the land.[10] In most cases it is not important to determine whether this is a resulting or a constructive trust. It would seem that where the wife retains her ownership of the purchase money until the purchase and intends that the husband should hold the legal title for his own benefit, her intention should be effectuated: if the trust above described is resulting, these facts would rebut it; if constructive, they remove all reason for the equitable remedy which is the basis of a constructive trust.

If the husband purchases land with his wife's money and the conveyance is made to both husband and wife, the legal effect of the conveyance has not been changed by the statute. While it is frequently said that the statute abolished the unity of husband and wife, it is certain that it did not abolish the possibility of creating estates by entirety[11] which at common law rested on that unity.[12] A conveyance to husband and wife will therefore create an estate by entirety[13] at law, and this would seem to follow whether all of the money or only part of it belonged to the wife, though it has been suggested that since a conveyance to a husband and wife does not create an entirety where an intention that they shall hold in another manner is expressed[14] the fact that both furnish the purchase price may be evidence of such an intention and a legal cotenancy will then arise.[15] But though the estate by entirety exists, a court of equity will make the beneficial interest follow the purchase price as in the case of a husband's taking title to lands purchased with his wife's money, and what is an estate by entirety at law may be treated as a cotenancy in equity. The language of the cases is confusing in that a sufficient distinction is not drawn between equity and law in determining the effect of such conveyances. The question has usually arisen where the husband survived the wife, and her heirs sought to prevent his claiming the benefit of survivorship which is an incident of the estate by entirety.

In *Garner* v. *Jones*,[16] it was stated as *dictum*, "It may be conceded that if a husband invests the separate funds of his wife in real estate, and takes a deed to them jointly, a court of equity would protect her in the enjoyment of the property, and declare a trust in her favor."[17] This *dictum* was followed in *Hudson* v. *Wright*,[18] where the entire purchase money

10. *Bowen* v. *McKean* (1884) 82 Mo. 594.
11. *Bains* v. *Bullock* (1895) 129 Mo. 117, 31 S. W. 342; *Frost* v. *Frost* (1906) 200 Mo. 474, 481, 98 S. W. 527.
12. *Gibson* v. *Zimmerman* (1849) 12 Mo. 385; *Garner* v. *Jones* (1873) 52 Mo. 68.
13. Revised Statutes 1909, § 2878, which has been on the books in its present form since 1865, and which provides that conveyances to two or more persons shall create tenancies in common, expressly excepts conveyances to a husband and wife.
14. 30 L. R. A. 322.
15. *Johnston* v. *Johnston* (1902) 173 Mo. 91, 73 S. W. 202. In *In re Albrecht* (1892) 136 N. Y. 91, 94, it is stated, "what would be the legal rights of the parties where upon a purchase of real property, the husband and wife had each contributed from their separate estates equally or in any other ascertained proportion to the payment of the consideration, does not as yet seem to have been the subject of judicial decisions."
16. (1873) 52 Mo. 68. The "separate estates" of the wife could not be reduced to possession before the Married Woman's Act.
17. See also *Modrell* v. *Riddle* (1884) 82 Mo. 31.
18. (1907) 204 Mo. 412, 103 S. W. 8.

came from the wife, without her written consent. In *Jones* v. *Elkins*,[19] the husband used some of his own money together with his wife's, and purchased lands in their joint names. Equity decreed, at the suit of her heirs, a trust in the land against the surviving husband, proportionate to the money of his wife invested. There was a similar decree in *McLeod* v. *Venable*,[20] even though the wife orally consented to the investment. In *Donovan* v. *Griffith*,[21] it was again held that a conveyance to a husband and wife creates a cotenancy in equity at the suit of the heirs of the wife, where the husband used the wife's money without her written consent for part of the purchase price.

In *Johnston* v. *Johnston*,[22] a note was made payable to a husband and wife, being given for independent advances made by each of them. Though the court conceded that an estate by entirety in personalty is possible,[23] and though there was no intermeddling by the husband with the wife's money, it was held that her death before that of her husband would not deprive her heirs of a proportionate part of the proceeds of the note, invested in land after her death.

The question arises in a new form in the recent case of *Moss* v. *Ardrey*,[24] in which the husband used his own and his wife's money in purchasing land which was conveyed to both husband and wife. The wife had not assented in writing to this use of her money. The husband predeceased the wife and his heirs sought to have the wife, as legal owner of the land by survivorship, declared a trustee of a part proportionate to the amount of the purchase price which the husband advanced. The court admitted that the wife's heirs could have had relief on *Jones* v. *Elkins*, but denied such relief to the husband's heirs. The proper decision of the case necessarily involves the determination of the nature of the trust for which the court granted relief in *Jones* v. *Elkins* and the two subsequent cases referred to—whether it is a resulting or a constructive trust.

A fundamental distinction between these two kinds of implied trusts is well recognized.[25] The resulting trust is founded upon the intention of the parties, as derived from their acts or words, and hence establishes equitable rights in the subject matter. The constructive trust is founded upon a wrong done, and is the consequence of a mere remedy given to the injured party. If the true nature of the trust in *Moss* v. *Ardrey* is resulting, as the court said it was, then there were existing equitable interests in the land. The fact that the husband died before the wife could not enlarge her interest, nor deprive his heirs of his existing interest. In other words, if the trust is a resulting one, there is an equi-

19. (1898) 143 Mo. 647, 45 S. W. 847.
20. (1901) 163 Mo. 536, 63 S. W. 847.
21. (1908) 215 Mo. 149, 114 S. W. 621.
22. (1902) 173 Mo. 91, 73 S. W. 202.
23. See *Shields* v. *Stillman* (1871) 48 Mo. 82.
24. (1914) 169 S. W. 6.
25. Pomeroy, Equity Jurisprudence (3d ed.), § 1030; Perry, Trusts and Trustees (6th ed.), § 166; *Merrill* v. *Hussey* (1906) 101 Me. 429, 64 At. 819; *Fulton* v. *Jansen* (1893) 99 Cal. 591, 34 Pac. 331; *Farmer's and Trader's Bank* v. *Kimball Milling Co.* (1890) 1 S. D. 388, 47 N. W. 402.

table cotenancy and therefore the heirs of the husband should have been given relief against the surviving wife. There must be a fraud committed by one party upon another, before a constructive trust arises. Irrespective of the statute in the present case, if a person having a fiduciary character (a husband has such a character with respect to his wife's separate property) purchases property with the funds in his hands, and takes the title in the name of any one but the beneficiary either a resulting or a constructive trust may arise.[26] The nature of the trust depends upon the intent of the parties, the husband and wife, whether done in recognition of the rights of the wife, with her consent, or in repudiation of them, and against her will. Nor can it be insisted that the statute has made any dealing by the husband with his wife's personalty without her written consent amount to a repudiation of her rights, and hence a legal fraud upon her. The furthest that the cases have gone in construing this provision has been to declare that any assertion of ownership, in hostility to the wife's title, may be successfully resisted by her. But an investment not in her name is not so unequivocally an act showing a disposition by the husband to treat her money as belonging to him, that in a court of equity the circumstances attending the transaction cannot be inquired into. And if it is shown that the investment of her money was made under a mutual understanding that her interest was to be protected, it cannot be said that the husband has committed a fraud on the wife. Surely a case where a husband uses the money without repudiating her right to it is not within the scope of the statutory requirement of written assent.

It seems, therefore, that in *Moss* v. *Ardrey*, whether the heirs of the husband should have been given equitable relief against the surviving wife should have depended upon the intent of the husband and wife at the time he purchased the land in controversy. If the case had been tried on this theory it might have been shown that the wife consented. The record, however, being barren of any evidence upon this point, the decision of the court in denying the complainants relief seems proper, since the establishment of facts creating a resulting trust was essential to their case.

R. BURNETT.

26. Perry, Trusts and Trustees (6th ed.), § 127, note (b).

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